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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No._____

NATIONAL LEAD COMPANY, A CORPORATION,

Petitioner,

VS.

MAX SCHUFT AND WILLIAM G. SCHUFT (PLAINTIFFS) AND MILLERS NATIONAL INSURANCE COMPANY, MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLER'S MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, MILL OWNERS MUTUAL FIRE INSURANCE COMPANY, GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLERS MUTUAL FIRE INSURANCE COMPANY, WESTERN MUTUAL FIRE INSURANCE COMPANY, THE MILLERS MUTUAL FIRE INSURANCE COMPANY OF TEXAS, NATIONAL RETAILERS MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, IOWA HARDWARE MUTUAL INSURANCE COMPANY AND THE OHIO HARDWARE MUTUAL INSURANCE COMPANY, CORPORATIONS (ADDED PLAINTIFFS),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

To the Honorable THE SUPREME COURT OF THE UNITED STATES:

The petition of National Lead Company, a Corporation, respectfully shows:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED

Petitioner seeks review of a judgment by the United States Court of Appeals of the Eighth Circuit rendered August 12, 1949 affirming a judgment by the District Court of the United States for the District of South Dakota entered October 5, 1948, and which was for recovery by Respondents (then Plaintiffs) of $41,800.00 plus $316.88 costs from Petitioner (then Defendant).

The action was for a money judgment, with jurisdiction grounded on diversity of citizenship. Respondents sought damages for destruction by fire of a building and contents at Belle Fourche, South Dakota, April 13, 1947. The fire originated in an adjoining structure wherein Petitioner conducted a plant for processing of bentonite (a clay found in the locality) and in which plant, for several days prior to the fire, there had also been conducted processing of lignitic humus, which is lignite coal found close to the earth's surface and thereby oxidized. The fire spread from Petitioner's plant to the adjoining building, of which the Respondents named above as Plaintiffs were the owners, and as to which the remaining Respondents, named above as added Plaintiff's were carriers of fire insurance, and by virtue of loss payments had been partially subrogated to rights of the owners against Petitioner.

Respondents' claim against Petitioner was predicated on alleged negligence of Petitioner as to the origin and escape of the fire.

There was no direct evidence to support such claim of negligence. When the fire was first discovered, it had made sufficient progress so smoke prevented ingress into the upper part of the structure. Evidence as to origin of the fire, and as to the alleged negligence, was entirely circumstantial.

From the adverse judgment of such District Court, Petitioner appealed to the United States Court of Appeals of the Eighth Circuit, contending the evidence was insufficient as a matter of law to sustain Respondents' claim. It was Petitioner's position that under the applicable local law, established by the South Dakota Supreme Court, damages could not be awarded on the basis of circumstantial evidence, unless the circumstantial evidence was not only consistent with the asserted claim, but inconsistent with any other rational theory, and with the proof such as to "produce conviction to a reasonable certainty on an unprejudiced mind." Petitioner asserted the proof did not meet the stated requirement.

The Court of Appeals affirmed the District Court judgment. As later more fully developed, Petitioner believes the controlling principles announced by the Court of Appeals at variance with the local law as declared by the South Dakota Supreme Court.

In the appended brief, the evidence is sufficiently summarized to show the relevant fact situation.

II.

BASIS FOR JURISDICTION

Sections 1254 (1) and 2101 (c), United States Code, and Rule 38, revised Rules of the Supreme Court of the United States, are the jurisdictional basis for review in this Court.

Under "Reasons for Allowing the Writ" is set forth Petitioner's contention that the Court of Appeals decision has decided an important question of local law in a way probably in conflict with the applicable local decisions.

III.

QUESTION PRESENTED

The case presents the following:

1. Whether the Court of Appeals misconstrued and failed to follow the applicable local law as to recovery of damages in a civil suit based entirely on circumstantial evidence, such local law being established by *Meier and Lockwood Corp. v. Dakota Livestock & Investment Co.*, 46 S. D. 397, 193 N. W. 138, *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503 and *Erickson v. Todd*, 62 S. D. 280, 252 N. W. 879, and being to

the effect that in such case the action could be maintained only if the circumstances shown were consistent with the asserted claim, and inconsistent with any other rational theory, and with the proof such as to produce conviction to a reasonable certainty.

IV.

REASONS FOR ALLOWING THE WRIT

As already indicated, it is Petitioner's position that the Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions.

Meier and Lockwood Corp. v. Dakota Livestock & Investment Co., 46 S. D. 397, 193 N. W. 138, *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503, and *Erickson v. Todd*, 62 S. D. 280, 252 N. W. 879, already cited, are the decisions upon which Petitioner relies.

The Court of Appeals decision purportedly recognizes the doctrine of the South Dakota cases, but follows it only in form, as distinguished from following it in substance. The Court of Appeals decision in fact emasculates the local rule to an extent whereby it is meaningless, and undistinguishable from the less stringent rule of various other jurisdictions.

This is apparent from the following, with Arabic numerals in parentheses denoting references to the Court of Appeals opinion, as contained in the record certified to this Court:

> First, as appears from the latter part of the Court of Appeals opinion (176-177), the Court interprets the applicable local law to the effect that where under the evidence "such an occurrence is within reason, then it was for the jury to say whether the fire was so caused or not." This was grounded on what was quoted in the *Meier* case from a Wisconsin decision. A complete misconception of the *Meier* case is manifest. The court quoted from the Wisconsin decision simply on the point that origin of a fire could be shown by circumstantial evidence. As to the degree of proof required in such a case, the South Dakota Supreme Court explicitly said:
>
> > "It seems to be the rule that, under circumstances where the origin of a fire must be determined by circumstantial evidence, such circumstances must

be shown as will produce conviction to a reasonable certainty on an unprejudiced mind, and that each fact, from start to finish, shall by reasonable inference connect with the next fact in the line. . . ."

This squares with the *Erickson* and *LeZotte* cases. In the *Erickson* case the court held that the rule in a civil case as to the weight of circumstantial evidence is the same as in a criminal case, and that "the facts and circumstances shown must not only be consistent with such theory, but inconsistent with any other rational theory." The end result of the Court of Appeals decision in the present case is that the circumstantial evidence is sufficient if an inference could reasonably be drawn to support the asserted theory. This ignores the requirement that the evidence must exclude every other rational theory, and establish the claim to a reasonable certainty.

Second, from the last two paragraphs of its opinion, it is clear the Court of Appeals further misconstrued the established local law. The court held in effect that the rule as to exclusion of "any other rational theory" has application only where some other theory is established by the evidence. Whatever may be the case in jurisdictions where the rule as to circumstantial proof in civil cases is less strict, in South Dakota the applicable requirement is that the party asserting the claim can do so only by excluding every other rational theory. There is no burden on the adverse party to establish such other rational theory. This is shown by the *LeZotte* case where the South Dakota Supreme Court held the circumstantial evidence insufficient to supoprt an asserted claim as to origin of a fire, and this on the ground the evidence did not exclude hypotheses that the fire had been set intentionally or that there had been an explosion.

The basic question before the Court of Appeals was whether Respondents had established their case to the extent required by local law. Petitioner contended the case did not present a jury question unless it could reasonably be said that every rational theory, other than that asserted, was excluded, and

with Respondents' contention established to a reasonable certainty. Contrary to the *LeZotte* case the Court of Appeals held a jury case was made if the jury could reasonably infer the fire originated as contended, and placed the burden on Petitioner to establish some other rational theory, rather than on Respondents to negative any other rational theory.

The question is one of substantive law rather than merely procedural. It was so treated by the Court of Appeals of the Eighth Circuit in *Hardware Mutual Insurance Co. of Minnesota v. Jacob Hieb, Inc.*, 146 F. (2d) 447. If the present Court of Appeals decision stands, where a claim dependent on circumstantial evidence originates in South Dakota, a litigant unable to make a case in the state courts may prevail if in a situation such that he can resort to the federal courts. This is precisely the anomaly which *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 was designed to prevent.

Civil cases dependent on circumstantial evidence are frequent. To the end that where such cases originate in South Dakota the controlling principles should be the same in the federal courts as in the state courts, the sought review is urged.

PRAYER

WHEREFORE, your Petitioner respectfully prays that an order be entered granting this application for a writ of certiorari to review the decision of the United States Court of Appeals of the Eighth Circuit in the case numbered and entered on its docket as No. 13,883, National Lead Company, a Corporation, Appellant, vs. Max Schuft, et al., Appellees, and that the judgment be reversed and that your Petitioner have such other and further relief as to this Honorable Court may seem meet and just.

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Sioux Falls, South Dakota,

R. E. DRISCOLL, JR.
Rapid City, South Dakota,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No._____

NATIONAL LEAD COMPANY, A CORPORATION,
Petitioner,

vs.

MAX SCHUFT AND WILLIAM G. SCHUFT (PLAINTIFFS) AND MILLERS NATIONAL INSURANCE COMPANY, MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLER'S MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, MILL OWNERS MUTUAL FIRE INSURANCE COMPANY, GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, MILLERS MUTUAL FIRE INSURANCE COMPANY, WESTERN MUTUAL FIRE INSURANCE COMPANY, THE MILLERS MUTUAL FIRE INSURANCE COMPANY OF TEXAS, NATIONAL RETAILERS MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, IOWA HARDWARE MUTUAL INSURANCE COMPANY AND THE OHIO HARDWARE MUTUAL INSURANCE COMPANY, CORPORATIONS (ADDED PLAINTIFFS),
Respondents.

BRIEF IN SUPPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

The opinion herein of the United States Court of Appeals, Eighth Circuit (still unpublished) appears at Pages 171-177 of the record certified to this Court. The full citation is National Lead Company, a corporation, Appellant, vs. Max Schuft, et al., Appellees. The decision was rendered August 2, 1949.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked under Section 1254 (1) and 2101 (c), United States Code, and Rule 38 of Revised Rules of the Supreme Court of the United States. Petitioner contends review should be granted under paragraph 5 (b) of such Rule 38 in that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

III.

STATEMENT OF THE CASE

For references to the record, an Arabic numeral in parentheses will denote pages of the printed record certified to this court.

The suit was instituted in the United States District Court for the District of South Dakota for damages asserted to have been caused by alleged negligence of Petitioner in connection with the origin and escape of a fire which occurred April 13, 1947 in a bentonite processing plant operated by Petitioner at Belle Fourche, South Dakota. The fire spread to an adjoining structure owned by the Respondents named as Plaintiffs, and as to which the remaining Respondents were fire insurance carriers. Trial resulted in a jury verdict for Respondents for Forty-one Thousand Eight Hundred Dollars ($41,800.00), and on October 5, 1948 the District Court entered judgment for that amount and costs in favor of Respondents.

By appeal Petitioner took the case to the United States Court of Appeals of the Eighth Circuit contending that the evidence was insufficient to support the verdict, and that the Trial Court should have directed a verdict for Petitioner. By its Judgment entered August 12, 1949 the Court of Appeals rejected this contention and affirmed the District Court Judgment.

Petitioner here contends that the Court of Appeals misconstrued and did not follow the local law as established by the South Dakota Supreme Court. The fact situa-

tion will be reviewed sufficiently to show the relation thereto of the contentions herein advanced.

Petitioner's plant was a wooden building with a gable roof, the peak of which was fifty-one feet above the ground level (55, 139). There were three floor levels, with the two upper levels partly filled with catwalks and other objects but not completely (5, 7, 141-143, 145). The plant was chiefly used for grinding of bentonite, a type of clay used after processing for industrial purposes, including well drilling operations (8).

Commencing four or five days before the fire, some so-called lignitic humus was ground (13, 20, 22). Bentonite was ground on a twenty-four hour a day schedule, and the humus operation only a few hours a day (20).

Such humus is the end product of atmospheric oxidization of ordinary lignite so close to the ground surface it is exposed to air and weather conditions (87, 88, 89, 100, 101). As indicated by the opinion, there was evidence that during the humus grinding operations extensive clouds of black dust from the humus permeated the plant and settled on the walls, ceilings, floors, etc. (172, 173).

There was some conflict as to the inflammability and explosive qualities of the humus dust. There was agreement, however, that it was not any more inflammable than wood (44, 105, 109, 110). There was also agreement that it was not inflammable or explosive unless heated to 1100 degrees Fahrenheit (33, 93, 103, 104). Petitioner's two expert witnesses and one of Respondents' expert witnesses agreed there could be no propagation of flame in such a dust cloud unless there was a concentration of at least one-fifth of an ounce to a cubic foot, which would make a cloud so dense persons close together would have an indistinct view of each other (33, 34, 93, 104). Respondents' remaining expert thought he could get propagation on a lesser concentration than one-fifth of an ounce to a cubic foot (122). There was also agreement that bentonite dust was not inflammable and that mixture of bentonite dust with humus dust would cut down inflammability (109, 121).

As shown by the accompanying Petition for the Writ, the critical question is whether the Court of Appeals correctly construed and followed the local law of South Dakota as to

proof required to support a claim based solely on circumstantial evidence. Accordingly, it is important to show the fact situation so far as it reflects anything which would sustain a finding that Petitioner's negligence, if any, in the humus operations, was the proximate cause of the fire.

As stated in the Court of Appeals decision it was Respondents' theory that: "The fire box openings in the furnaces and the exposed gas flames of the conveyors created a dangerous condition in relation to the inflammable humus dust, amounting to negligence on the part of National Lead, and that this negligence had been the cause of the fire."

The furnaces were on the ground floor, and only two were in actual operation the morning of the fire (6, 68, 141). Three of the gas flames were lighted the morning of the fire, these being on the ground floor (68, 141). None of the expert witnesses supported Respondents' theory as to the causative agency of the fire. Both of Petitioner's experts stated opinions that the humus operations were not responsible (94, 113). One of Respondents' experts was not asked for an opinion as to this (29, 37). The other of Respondents' experts said he could form no opinion as to the cause of the fire, but that he believed the humus dust accelerated spread of the fire (120, 121), and that without the humus dust the chance of putting out the fire would have been "a lot better," but that he did not know whether, absent the humus, the fire could have been extinguished (124).

The testimony was in agreement to the effect that the humus processing was suspended at four or five o'clock the afternoon preceding the fire and that the bentonite processing continued, with the resulting dust from the bentonite (60, 66, 71, 72, 78). There was also agreement that the fire commenced about nine o'clock the following morning (12, 23, 56, 57, 62, 63, 68, 69, 76, 79).

With one exception the witnesses were in agreement that on the morning of the fire the humus dust had settled, and that there was no such dust in the air (20, 21, 57, 62, 69, 78). The one exception was Respondents' witness, Wesley Flack.

The Court of Appeals decision summarizes Mr. Flack's testimony in this respect to the effect that:

"When he came to work that morning the air still contained black dust, which he thought might have been due to the stirring up caused by the operation of the machinery. It was sufficiently heavy so that the janitor was unable to rid the floors of it in his morning cleaning. 'Sweep one room and come back and the next one would be just as bad as it was before he started.' "

This is incomplete in that it overlooks part of Mr. Flack's testimony whereby the foregoing was modified and qualified. Such additional testimony follows:

"They weren't grinding humus that morning. They hadn't been since four or five o'clock the afternoon before. I think it was five. It was about eight in the morning we came to work, fifteen hours from the time they had been grinding humus. Q. You certainly don't claim, Mr. Flack, there was any of that dark dust left in the air from the operation fifteen hours before? A. I could see it in the air. Q. You say there was a fellow sweeping. Is that it? A. Yes. Q. You claim there was some of that dust in the air from the fellow sweeping. Is that it? A. *I don't know if he was sweeping that morning.* Q. What you mean, of course, *is simply a small amount of it that you then saw.* Is that right? A. Yes, it was. Not as much as when they was grinding. It was still in the air." (27-28.) (Emphasis supplied.)

Mr. Flack was apparently the first person to notice the fire. At that time he was on the roof "clear at the top," smoking a cigarette (28). He smelled smoke, looked in, and saw smoke and some flame (28). Further:

". . . It seemed to be at the top part of the building when I seen it. All I could see was just smoke and fire through the window. As far as I could see *it was all at that top story.* It was not over in that part of the building where that window was that I came out. The blaze *seemed to break out*—I could see it from the outside. It seemed to come up and through the center of the roof. . . ." (28.) (Emphasis supplied.)

The quoted testimony was not disputed. Other persons in the building at the time were in lower portions thereof, and

testified in substance that when they saw the fire it was working downward, several of them placing its then position in the vicinity of the level of the third floor and one of them placing it at about the level of the second floor (56, 59, 62, 63, 64, 69, 75, 76, 77). There was undisputed evidence that railroad tracks adjoined the building immediately on the north, that a switch engine was operating there at the time of and immediately prior to the time of the fire (57, 64, 76) and that both gas and oil were used in the operation of the plant (6, 7, 68).

At the conclusion of the evidence the Trial Court overruled Petitioner's motion for a directed verdict, made on the ground the evidence was insufficient to sustain a verdict for Respondents (124, 125). Thereafter the Trial Court also overruled Petitioner's motion for judgment n. o. v. (153).

IV.

SPECIFICATION OF ERRORS

1. The United States Court of Appeals of the Eighth Circuit erred herein in holding in effect that the local law of South Dakota permitted a jury finding in favor of Respondents if an inference in favor of Respondents' contention was within reason, as distinguished from being established with reasonable certainty, and further erred in failing to recognize that such local law required Respondents to negative every rational theory as to the origin of the fire, other than that assertd by Respondents.

2. Such Court of Appeals further erred in holding Petitioner was not entitled to a jury verdict directed by the Trial Court.

V.

ARGUMENT SUMMARY

Point 1. The local law, as established by the South Dakota Supreme Court, is that Respondents could recover only if the evidence was consistent with Respondents' theory, and excluded every other rational theory, and if Respondents' theory was established to a reasonable certainty.

Point 2. The Court of Appeals failed to follow such local law in that: (a) the decision is to the effect Respondents could recover if an inference in favor of Respondents' theory was "within reason," as distinguished from established with reasonable certainty; and (b) in that the Court of Appeals erroneously relieved Respondents of the requirement that the evidence must exclude every rational theory other than that asserted by Respondents.

Point 3. Under the local law, properly construed and applied, the evidence did not sustain a jury finding in favor of Respondents.

Point 1.

THE LOCAL LAW, AS ESTABLISHED BY THE SOUTH DAKOTA SUPREME COURT, IS THAT RESPONDENTS COULD RECOVER ONLY IF THE EVIDENCE WAS CONSISTENT WITH RESPONDENTS' THEORY, AND EXCLUDED EVERY OTHER RATIONAL THEORY, AND IF RESPONDENTS' THEORY WAS ESTABLISHED TO A REASONABLE CERTAINTY.

There can be no substantial question as to this.

In *Meier and Lockwood Corp. v. Dakota Livestock & Investment Co.*, 46 S. D. 397, 193 N. W. 138, decided April 3, 1923, the South Dakota Supreme Court dealt with a fire alleged to have been started by sparks from a cook stove operated in connection with a hay camp. At page 406 of the South Dakota report and at page 142 of the North Western report, the Court said:

> "It seems to be the rule that, under circumstances where the origin of a fire must be determined by circumstantial evidence, such circumstances must be shown as will produce conviction to a reasonable certainty on an unprejudiced mind, and that each fact, from start to finish, shall by reasonable inference connect with the next fact in the line."

In *LeZotte v. Lindquist,* 51 S. D. 97, 212 N. W. 503, decided March 7, 1947, the Plaintiff's claim was that a fire originated from negligence in operating a defective stove. As shown by pages 101-2 of the South Dakota report and page 505 of the North Western report, the Court held the Plaintiff had failed to establish a case in that the evidence did not exclude all reasonable hypotheses other than that asserted by the Plaintiff as to the cause of the fire.

Erickson v. Todd, 62 S. D. 280, 252 N. W. 879, decided February 15, 1934, is not a fire case, but dealt with the requirement applicable when it is sought by circumstantial evidence to establish a fact contention in a civil action. As appears at page 284 of the South Dakota report and at page 881 of the North Western report, the Court said:

> "This court has consistently applied the rule in criminal cases that, in order that a theory be established by circumstantial evidence, the facts and circumstances shown must not only be consistent with such theory, but inconsistent with any other rational theory. (Citing cases.) This rule, we are convinced, should be the rule whereby the weight of circumstantial evidence is determined in a civil case as well as in a criminal case."

The foregoing rule, as stated in the *Erickson* case, was approved in *General Tire and Rubber Co. v. Hamm*, 69 S. D. 72, 77, 6 N. W. (2d) 442, 444, decided November 28, 1942.

The *LeZotte* case was cited with approval in *Smith v. Gilbert Yards*, 70 S. D. 246, 249, 16 N. W. (2d) 912, 913, decided December 21, 1944.

In *Hardware Mut. Ins. Co. of Minnesota v. Jacob Hieb, Inc.*, 146 F. (2d) 447, 452, 453, decided January 8, 1945, the United States Court of Appeals of the Eighth Circuit held that the foregoing quotation from the *Erickson* case stated the local law of South Dakota, and was binding on the Federal Courts under *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Point 2.

THE COURT OF APPEALS FAILED TO FOLLOW SUCH LOCAL LAW IN THAT: (A) THE DECISION IS TO THE EFFECT RESPONDENTS COULD RECOVER IF AN INFERENCE IN FAVOR OF RESPONDENTS' THEORY WAS "WITHIN REASON," AS DISTINGUISHED FROM ESTABLISHED WITH REASONABLE CERTAINTY; AND (B) IN THAT THE COURT OF APPEALS ERRONEOUSLY RELIEVED RESPONDENTS OF THE REQUIREMENT THAT THE EVIDENCE MUST EXCLUDE EVERY RATIONAL THEORY OTHER THAN THAT ASSERTED BY RESPONDENTS.

From the opinion below it is manifest that the Court of Appeals fell into the basic error of recognizing existence of the law established by the South Dakota decisions, but nevertheless construing and treating such local law exactly the same as if the less stringent rule were to be followed.

Beyond doubt, the rule in many—perhaps most—jurisdictions is less stringent.

The more liberal rule is that stated in 20 Am. Jur. at Page 1043, in Section 1189 as follows:

> ". . . In civil cases the rule of criminal law that where circumstantial evidence is submitted the facts proved must be such as to preclude every other hypotheses except the guilt of the accused does not apply. In a civil case circumstantial evidence need not exclude every reasonable conclusion other than that arrived at by the jury. The rule as to circumstantial evidence in a civil case is that a party will prevail if the preponderance of the evidence is in his favor. Where two equally plausible conclusions are deducible from the circumstances, the jury is left to decide which shall be adopted."

In 23 C. J., at Page 49, in Section 1792, the more liberal rule is stated as follows:

> ". . . but there is also authority for the view that it is sufficient for the party having the burden of proof to make out the more probable hypothesis, and that the evidence need not rise to that degree of certainty which will exclude every other reasonable conclusion . . ."

If the present case had arisen in a jurisdiction following the liberal rule, the problem would be different. The distinction is vital. As shown by the above text quotations, under the more liberal rule it is simply a question of whether under the circumstances shown the jury may reasonably draw the asserted inference. On the other hand, and as shown by the South Dakota cases, and the authorities therein cited, where the strict rule prevails, a case is established only if the evidence can fairly be said to permit only one reasonable conclusion, with all other rational theories excluded.

That the court below mistakenly applied the more liberal rule is evident (176, 177). The court concludes that Respondents' theory was a reasonable inference as distinguished from "mere speculation and conjecture." Then, and from the paragraph of the opinion commencing at the bottom of Page 176, it is apparent that the court misconstrued the *Meier* case as authority that if "such an occurence is within reason, then it is for the jury to say whether the fire was so caused or not." Such misconstruction of the *Meier* case stemmed from the fact that this language was quoted from a Wisconsin decision. This, however, was simply on the point that origin of a fire could be proved by circumstantial evidence, and did not deal with the quantum of proof required to make a case. In a succeeding paragraph the South Dakota court directly stated that the circumstances must be such as to "produce conviction to a reasonable certainty on an unprejudiced mind."

If there were room for any doubt as to the effect of the *Meier* decision, it is removed by the later South Dakota Supreme Court decisions in the *LeZotte* and *Erickson* cases, the latter explicitly stating the rule that the "facts and circumstances shown must not only be consistent with such theory, but inconsistent with any other rational theory," with the controlling principle the same in a civil as in a criminal case.

This is almost the antithesis of the liberal rule that it is enough if the inference is "within reason." Nowhere does the lower court pass on the question whether it could fairly be said that Respondents' theory was the *only* reasonable inference from the evidence, showing that the case was decided in the light of the liberal rule, and that the strict rule was not followed at all.

Corollary to the foregoing, and as shown by the last two paragraphs of the opinion, the Court of Appeals fell into the error of holding that "any other rational theory" was limited to such theories as are established by the evidence, rather than to any theory *open* under the evidence.

Such error was also fundamental. It would leave the strict rule meaningless and undistinguishable from the liberal rule.

The *LeZotte* case shows the South Dakota court had an entirely different conception of the strict rule than that stated by the lower court. In the *LeZotte* case the plaintiff contended the fire originated from an over-heated defective stove. The court said:

> "Assuming that it be true that the peculiar defects of this stove rendered it possible for it to be overheated; there is yet no proof that the stove either did become overheated—excepting the presumption which we have heretofore considered—or that, if the stove did become overheated, it caused the destruction of the building. Despite the defects in the stove, the fire may have been set intentionally. There may have been an explosion in the stove in no wise caused by any defects of the stove, which scattered fire in the room in which the stove was standing, or an explosion which, through the other opening in the chimney, scattered fire on the goods stored in the adjoining room . . . " 51 S. D. 101.

Other cases following the strict rule are to the same effect. For instance, in *Neal v. Chicago, R. I. & P. R. Co.*, 129 Iowa 5, 105 N. W. 197, cited by the South Dakota court in the *Erickson* case, it was held that plaintiff's circumstantial evidence as to proximate cause had failed because another theory, than that asserted, was not excluded, and the court added:

> ". . . This is, of course, a mere surmise, but we are justified in any surmise which is as consistent with the facts proven as the theory which is sought to be established by such facts for the purpose of determining whether the proven facts tend to support plaintiff's theory . . ."

Under the applicable local law, Respondents could prevail only if Respondents' theory was established with "reasonable certainty," exactly as if the issue arose in a criminal case, and with every other rational theory excluded.

In the present case, it is apparent the Court of Appeals did not follow and apply the established local law.

Point 3.

UNDER THE LOCAL LAW, PROPERLY CONSTRUED AND APPLIED, THE EVIDENCE DID NOT SUSTAIN A JURY FINDING IN FAVOR OF RESPONDENTS.

The ultimate question is whether it could be reasonably concluded that Respondents proved their case to a "reasonable certainty," establishing that their theory is consistent with the circumstances shown, and that every other rational theory has been excluded, this after resolving all evidentiary conflicts in favor of Respondents, and giving Respondents the benefit of all inferences that may reasonably be drawn in their favor from the evidence.

The Court of Appeals felt the jury might reasonably have found the following basic facts:

> First, and on the basis of Wesley Flack's testimony, that there was a substantial amount of humus dust in the air the morning of the fire.
>
> Second, that although there was no dispute that the humus dust could not ignite or explode unless heated to 1100 degrees Fahrenheit, with a concentration reaching, or at least approaching, one-fifth of an ounce to a cubic foot, there was testimony this "could" be affected by other variables in the air.

Third, that although eyewitnesses who saw the fire in its early stages placed it at various points from the roof to the second floor, and travelling downward, it could be that gases were originally ignited by the furnaces or gas flames on the ground floor, and when heated, traveled upward.

Fourth, that the rapid spread of the fire and the series of puffs of smoke and fire indicated "some form of gaseous propagation."

Fifth, that all the evidence indicated the fire started inside the plant, and that this negatived any theory the origin was from the switch engine.

The statement of the foregoing in itself shows the proof did not measure up to the requirement of the local law. Assuming all of the stated elements justified, the most that can be said is that the evidence supported a belief that the fire could have been caused by ignition of the humus dust. It could not be said that this is established with "reasonable certainty"—that every other rational theory is excluded.

Moreover, and in essential particulars, the evidence does not justify several of these five elements.

Mr. Flack's testimony does not support a conclusion that there was any dust concentration such as that essential for ignition or explosion. It is true that at one point he testified as quoted at Page 4 of the opinion, and that this could have been construed as having reference to conditions on the morning of the fire. However, he later qualified and modified this as follows:

". . . It was about eight in the morning we came to work, fifteen hours from the time they had been grinding humus. Q. You certainly don't claim, Mr. Flack, there was any of that dark dust left in the air from the operation fifteen hours before? A. I could see it in the air. Q. You say there was a fellow sweeping. Is that it? A. Yes. Q. You claim there was some of that dust in the air from the fellow sweeping. Is that it? A. *I don't know if he was sweeping that morning.* Q. *What you mean, of course, is simply a small amount of it that you then saw. Is that right?* A. *Yes, it was. Not as much as when they was grinding. It was still in the air.*" (27-28.) (Emphasis supplied.)

The cited expert testimony was simply as to what "could" have been. There was no actual evidence that humus dust had in fact been dislodged.

There was no evidence that the "puffs" of smoke and rapid spread of the fire were peculiar to a fire from humus dust, as distinguished from wood. In fact, the evidence was to the contrary. All of the experts agreed that wood is at least as inflammable as humus or humus dust (44, 105, 109, 110). It is a well known physical fact that fire is the burning of gas emanating from the heated substance, whether the substance is humus or wood, and there is no evidentiary or other basis for an inference that the manifestations noted were peculiar to a humus fire rather than a wood fire.

As to variables in the air, the evidence is undisputed that the variable present in large quantities was bentonite dust, which would cut down, instead of increase, the inflammable or explosive qualities of the humus (109, 121).

The evidence was, in fact, consistent with a theory that the fire started on the roof. Mr. Flack testified that when he first saw the fire:

> ". . . It seemed to be at the top part of the building when I seen it. All I could see was just smoke and fire through the window. As far as I could see *it was all at that top story.* It was not over in that part of the building where that window was that I came out. The blaze *seemed to break out—I could see it from the outside. It seemed to come up and through the center of the roof.* I could see the flame in through the window. I saw the flame both places. I saw it near the center of the roof, and that was way at the top . . ." (28.) (Emphasis supplied.)

This is exactly what would have occurred if the fire had started from a spark on the roof. As soon as the fire had burned through the roof, it would "come up and through" the roof.

Mr. Flack's testimony in this respect was undisputed. There was no basis for rejection of it. He was Respondents' witness. All of the other testimony is reconcilable with what he said he saw. It is apparent that the witnesses who saw the fire at a lower level detected it later than Mr. Flack, and

said it was travelling a downward course. Accordingly, the evidence did not exclude, but on the contrary supported, a rational theory that the fire started on the roof. Neither did the evidence exclude numerous other rational theories, all of which were left open, such as escaping gas, ignition of fumes from the oil burners in the furnaces, and many others.

The point is illustrated and made clear by a comparison of the South Dakota Supreme Court decisions in *Meier and Lockwood Corp. v. Dakota Livestock & Investment Co.*, 46 S. D. 397, 193 N. W. 138 and in *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503.

In the *Meier* case the plaintiff asserted the fire was caused by negligent operation of a cook stove at a hay camp. It was shown that the fuel used was soft coal, with no screen or other protection to prevent escape of sparks. On the basis of the following, the court held the case presented a jury question:

> "There was only one fire within a mile and a half of the cook car. There was a hot fire in the cookstove in the cook car at the time the fire started, about 100 feet away. There was no spark arrester or anything to prevent sparks escaping from the cookstove. The chimney to the cookstove was a straight pipe not over 6 feet high. The fire probably started within from 75 to 125 feet of the cook car. At the time the fire started or just before, the wind was in the right direction to carry cinders or sparks from the cookstove to the place where the fire started. No other cause than a spark from this cookstove is known which could have caused the fire. The stubble and hay were quite close to the cook car, and were very dry and in a highly inflammable condition. The high wind would naturally ignite sparks. It is probable that a fresh fire was started to get the dinner, because the day was hot and no other reason for building a fire than the getting of the noon meal is suggested." (See Page 406 of the South Dakota report, and Page 142 of the North Western report.)

On the other hand, and in the *LeZotte* case, the court dealt with circumstances insufficient to make a case under

the requirement of the local law. The plaintiff claimed the fire was caused by negligence in overheating a stove. It was shown there were V-shaped cracks in the fire pot, that the grate was held up on one side by a brick placed in the ash pan, and that there was no damper in the stove pipe which connected the stove with a brick chimney, plaintiff contending that the crack and the lack of a damper would permit the stove to become overheated. The court held this proof did not reach the required standard in that

> "Assuming that it be true that the peculiar defects of this stove rendered it possible for it to be overheated; there is yet no proof that the stove either did become overheated—excepting the presumption which we have heretofore considered—or that, if the stove did become overheated, it caused the destruction of the building. Despite the defects in the stove, the fire may have been set intentionally. There may have been an explosion in the stove in no wise caused by any defects of the stove, which scattered fire in the room in which the stove was standing, or an explosion which, through the other opening in the chimney, scattered fire on the goods stored in the adjoining room . . ."

The analogy of the *LeZotte* case to the present case is apparent. In each instance the most that could be said is that the cause *could* have been that asserted, and in each instance there was failure to exclude all other rational theories. The *LeZotte* case is definite that if another rational theory is left open under the evidence, the case fails. The Court of Appeals was mistaken in its view that it was incumbent upon Petitioner to establish the fire was caused by an agency other than that claimed by Respondents.

CONCLUSION

The question here presented has application to every case originating in South Dakota, resting on circumstantial evidence, and litigated in the federal courts.

Unless the rule followed in the federal courts is harmonized with the local law, vital substantive rights will depend on whether the federal or the state courts are the forum. This is the evil at which the *Tompkins* case struck.

For this compelling reason, it is urged that this Court should review the case.

Respectfully submitted,

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APPENDIX

Rules 10(a), 10(b) and 10(c), United States Court of Appeals, Eighth Circuit

Rule 10(a) *Entire Record Not to Be Printed.* Unless ordered by this court, the entire record on appeal, or on petition to review or to enforce an order of an administrative board, agency or commission, need not be printed. The appellant or petitioner shall serve and file with his brief a separate printed record, carefully indexed, which shall contain a clear, concise and condensed statement of so much of the entire record on appeal or review as may be essential to show jurisdiction and to enable the court to decide the questions presented for review.

Rule 10(b) *Contents of Printed Record.* The printed record shall contain all of the essential pleadings, essential docket entries, the judgment or order appealed from or sought to be reviewed or enforced, and the opinion, findings and conclusions of the trial court or administrative agency, and, if the case was tried to a jury, the complete instructions of the trial court and the verdict. The printed record shall also contain so much of the evidence, either in narrative or question and answer form, as may be necessary to enable this court to determine the questions presented for decision. If the printed record contains any matter in a foreign language, it must be accompanied by a correct translation thereof. If the appellant or petitioner in his brief challenges rulings upon evidence, such evidence, the objections interposed thereto, and the rulings questioned shall be quoted in the printed record, and if the question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment of the court or board is raised by the appellant or petitioner, he shall include in the printed record all evidence received upon the trial or hearing pertinent to that question.

Rule 10(c) *Supplement to Printed Record by Appellee.* In case the appellee or respondent shall be of the opinion that the printed record submitted by the appellant or petitioner is inaccurate or omits essential portions of the entire

record, he may file and serve with his answering brief a separately printed supplement to the printed record, carefully indexed, containing such additional portions of the record as he deems essential for consideration by the court in deciding the case.